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No. 08-1304

IN THE

Supreme Court of the United States

FRANKLIN COUNTY POWER OF ILLINOIS, LLC, FORMERLY KNOWN AS ENVIROPOWER OF ILLINOIS, LLC; ENVIROPOWER, LLC; AND KHANJEE HOLDING (US), INC.,

Petitioners,

v.

SIERRA CLUB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION[1]

Petitioners demonstrated that the decision below conflicts with this Court's constitutional standing decisions requiring a plaintiff to show actual injury that is traceable to the defendant's conduct and redressable by the requested relief. Respondent's opposition fails to show otherwise. Respondent also fails to refute petitioners' showing that this case raises a recurring and important question of federal law because the court of appeals' dilution of this Court's standing principles in the context of Clean Air Act ("CAA") citizen suits threatens the entire electric utility industry by turning over to private parties the function of enforcing the environmental laws.

At the end of the day, the court of appeals' failure to hold respondent to the specific showings and burden of proof that this Court has set forth in its standing decisions ignores the legitimate agenda that Congress has prescribed for citizen suits, which is to support, but not supplant, the authority of federal and state environmental agencies. Here, petitioners have been prevented from constructing a state-of-the-art clean

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[1] Petitioners' counsel learned after the petition was filed that EnviroPower, LLC had been tentatively administratively dissolved by the Kentucky Secretary of State on November 1, 2008, and that Franklin County Power of Illinois, LLC, f/k/a EnviroPower of Illinois, LLC had similarly been involuntarily dissolved by the Illinois Secretary of State on February 13, 2009. These actions are minor administrative matters arising from oversights in light of personnel changes. Even prior to the filing of respondent's brief, the companies had begun the process of addressing these matters. As of this filing, the necessary timely steps have been taken to rectify the problem, which should be corrected in a matter of days. The validity of the corporate entities is not, and has never genuinely been, in question.

coal facility, even though the state and federal agencies have taken no action to invalidate the properly-issued permit. If the decision below is allowed to stand, other power plant builders will inevitably suffer the same fate at the hands of similar suits and meaningful public control over enforcement of the environmental laws will be lost.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioners demonstrated (Pet. at 12-24) that the decision below merits review because it conflicts with this Court's decisions requiring a plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks omitted). Respondent's attempt to reconcile the court of appeals' decision with those holdings is unavailing.

Respondent argues that there is no conflict between the decision below and this Court's decisions because the court of appeals cited those decisions in its rulings. See, *e.g.*, Opp. at 10. To be sure, as petitioners acknowledged, see Pet. at 14, the Seventh Circuit paid lip service to this Court's standing decisions. Federal courts, however, must do more than merely parrot constitutional principles that this Court has established. They must adhere to them. The Seventh Circuit failed to do so here, in three respects.

1. Petitioners demonstrated that the Seventh Circuit's decision conflicts with this Court's holding that plaintiffs cannot satisfy the "injury in fact" requirement of this Court's standing framework by

pointing to "subjective apprehensions" that do not demonstrate a "realistic threat" of the alleged future injury. Pet. at 15-18 (internal quotation marks omitted) (citing *Friends of the Earth, Inc.* v. *Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000)). Petitioners showed that Barbara McKasson's feared injuries to her aesthetic and recreational interests are rooted in mere "subjective apprehensions" that are not realistic because they stem from emission limitations that the federal and state environmental agencies deemed sufficient to protect air quality under the CAA. *Id.* at 16-17.

Respondent does not dispute that the injuries it asserts to establish standing are alleged injuries to McKasson's aesthetic and recreational interests that stem from the emission limitations in the 2001 permit – and not from any "illegal" discharges by petitioners or non-compliance with environmental standards, as in *Laidlaw* and the other cases that respondent cites. Opp. at 10-11; see also *id.* at 11-12 (emphasizing that the power plant is a "source of pollution" that will have a "negative effect" on the environment and noting that McKasson's "specific concerns" derive from the "proposed plant's pollutants"). Instead, respondent argues (*id.* at 10-11) that harm to aesthetic and recreational interests can serve as "injury in fact" in some environmental cases – a point that petitioners do not dispute, see Pet. at 15 – and that petitioners' argument "ignores the fact that PSD permits do not remain valid indefinitely" because pollution control technology and environmental conditions can change. Opp. at 13. Petitioners, however, do not ignore this fact. To the contrary, petitioners noted (Pet. at 6 n.2) that they were required by the CAA to apply for renewal of

their permit in 2006 with updated BACT and air modeling analyses, and did so in a timely manner.[2]

To the extent that respondent is suggesting that the alleged injuries to McKasson's aesthetic and recreational interests derive from a possible incremental difference in the emission limitations in the 2001 permit and a hypothetical new permit, respondent fails to refute petitioners' showing that it has never established either how the IEPA would set the emission limitations in a new permit or that any incremental tightening of the emission limitations would be perceptible to McKasson, much less eliminate her aesthetic and recreational concerns. See Pet. at 21-22. Respondent has the burden of proof to establish injury in fact and all of the other elements of standing, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, respondent has failed to meet this burden and has proffered nothing more than McKasson's "subjective apprehensions" that she would suffer cognizable injury as a result of the emission limitations in the 2001 permit.[3]

As a result, the instant citizen suit is nothing more than an impermissible collateral attack on the 2001

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[2] Respondent does not dispute that petitioners represented to the courts below that the proposed plant was designed "'to produce emissions below permitted levels.'" *See* Pet. at 16 n.6 (quoting Pet. App. 11a). Petitioners represented to IEPA and to the court of appeals at oral argument (and continue to maintain) that the renewal PSD permit emission standards would equal or surpass (*i.e.*, be lower than) the limits on *every* regulated emission, compared to *any* CFB power plant permitted in the United States, thus making this power plant the cleanest, state-of-the-art CFB coal-fired, baseload power plant in the nation.

[3] Respondent does not dispute that McKasson "did not learn about this case until after the Sierra Club filed suit." Opp. at 12.

permit decision. Pet. at 17-18. Respondent does not dispute that other federal courts have held that CAA citizen suits cannot be used to bring collateral attacks against the substance of state-issued permits, see *id.* at 17, but asserts that here "there is no existing permit to attack." Opp. at 14. This is incorrect. IEPA has never revoked the 2001 permit. To the extent that respondent is relying on the lower courts' determination that the permit has expired, this reasoning is circular. Petitioners are making the threshold argument that the lower courts had no jurisdiction to decide any issue raised by respondent's suit and, therefore, no jurisdiction to decide that issue in the first place. See *United States* v. *$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 78 (2nd Cir. 2002) ("Standing is a question that determines whether the claimant may properly invoke the jurisdiction of the federal courts to determine the merits of the underlying dispute, and it therefore logically *precedes*, not follows, that determination.").[4]

2. Petitioners next demonstrated that the court of appeals misapplied this Court's standing decisions in holding that respondent satisfied the causation

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[4] There is no merit to respondent's contention (Opp. at 12 n.5) that this Court would have to remand if it held that McKasson lacks standing because the lower courts did not address the possible standing of another Sierra Club member, Verena Owen. Respondent does not refute petitioners' showing that Ms. Owen's claim of injury in fact was far weaker than Ms. McKasson's claim because Ms. Owen merely asserted that she lived approximately 350 miles away from the proposed plant and was concerned about the allegedly diffuse effects of the plant's emissions on air quality. *See* Pet. at 10 n.4. Accordingly, if this Court were to hold that McKasson lacks standing, then it surely would conclude that Ms. Owen lacks standing and there would be no need for a remand.

requirement. Pet. at 18-19. Petitioners showed that there was a disconnect in the courts of appeals' causation analysis because it found that the alleged injury to McKasson's aesthetic and recreational interests was traceable to IEPA's issuance of the PSD permit in the first place with the specified emission limitations, which is not the conduct that respondent has challenged here. See *id.* at 15 (noting that respondent has not challenged any aspect of IEPA's actions in approving the 2001 permit).

Respondent fails to address this point and, therefore, fails to refute petitioners' showing that the court of appeals' analysis is inconsistent with this Court's requirement that a plaintiff demonstrate "a causal connection between the injury *and the conduct complained of.*" *Lujan*, 504 U.S. at 560 (emphasis added).

3. Finally, petitioners demonstrated that the court of appeals ignored this Court's standing decisions by improperly relying on a chain of speculative inferences to conclude that the injunction respondent seeks would redress McKasson's alleged injuries. Pet. at 19-24; see *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1150 (2009) (rejecting theory of Article III injury that required multiple assumptions). Specifically, petitioners demonstrated that the court of appeals' finding of redressability improperly rested on several speculative inferences, including that a new permit would have more stringent emission standards and that these standards would alleviate McKasson's alleged injuries. Pet. at 20-22.

Respondent attempts to sidestep this issue by arguing that "little additional analysis is necessary" and repeating the Seventh Circuit's unsupported conclusion that technological improvements "guarantee that a new permit would impose more stringent

pollution emission standards." Opp. at 15. Self-serving conclusory assertions, however, fail to rebut petitioners' specific showings that the court of appeals ignored that (1) the determination of emission limitations under the governing BACT standard is a highly individualized, case-by-case inquiry; (2) this Court's decisions do not permit federal courts to speculate that state policymakers will make a particular decision in the future to establish standing; and (3) this Court's decision in *Summers* requires federal courts to base standing determinations on individualized proof rather than general trends or statistical probabilities. See Pet. at 20-21. Respondent simply fails to address or defend the court of appeals' clear departure from this Court's decisions.

Respondent likewise fails to respond to petitioners' showing (*id.* at 21-22) that the court of appeals' finding of redressability was based on the additional speculative inferences that (1) any incremental reduction in emission levels from a new permit would be perceptible to McKasson; and (2) any such reduction would be of sufficient magnitude to eliminate or reduce McKasson's aesthetic and recreational concerns. Both inferences are matters of pure conjecture. As a result, the Seventh Circuit's finding of redressability here simply cannot be reconciled with this Court's holding in *Lujan* that it is the plaintiff's burden to establish that it is "*likely*, as opposed to merely *speculative*, that the injury will be redressed by a favorable decision," 504 U.S. at 561 (internal quotation marks omitted; emphases added), and its holding in *Summers* that standing cannot be based on a chain of speculation.

Respondent also argues that the district court's injunction provides its members with temporary

redress. Opp. at 16. This argument merely highlights respondent's interest in achieving delay and the short-sighted nature of its litigation strategy. The generation of electricity by this power plant would drive from the marketplace at least one highly polluting, more than 40 year-old coal-fired power plant that was grandfathered in by the CAA. IEPA has the expertise to evaluate the compensating environmental protection arising from this replacement. Neither Sierra Club nor the federal courts are so equipped. Therefore, by delaying or preventing petitioners' environmentally-sound plant from being built, respondent may well be creating a situation whereby the citizens of Illinois, including respondent's members, will be forced to get their power – either now or later – from sources that are less environmentally sound, and at higher prices.[5]

II. THE COURT OF APPEALS' STANDING RULING POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

Petitioners also demonstrated (Pet. at 24-27) that the court of appeals' dilution of this Court's standing principles in the context of CAA citizen suits presents a recurring and important question of federal law because it threatens to chill power plant builders from pursuing projects that are critical to serving our nation's increasing energy needs.[6] The decision

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[5] Respondent's assertion (Opp. at 2) that petitioners "no longer press their objection to the district court's conclusion that their permit has expired" is incorrect. Petitioners' position is that the permit has not expired and that the district court's conclusion to the contrary is invalid because it had no Article III jurisdiction to decide that issue. IEPA has not yet made a final determination on the expiration issue.

[6] *See* Nat'l Energy Policy Dev. Group, *National Energy Policy*, 1-5 (May 2001), *available at* http://www.pppl.gov/common_pics/

below also contributes to the growing trend of private groups performing an enforcement and even prosecutorial role with respect to environmental permits – at the expense of publicly accountable government officials.

Respondent does not deny either of these consequences. Instead, respondent asserts that petitioners are merely arguing "for repeal of the Clean Air Act's citizen-suit provision." Opp. at 16. This argument is wide of the mark. Petitioners have no quarrel with the availability of citizen suits or the remedies that the CAA provides.

Petitioners' argument is that this case presents an important question of federal standing law because the decision below eviscerates constitutional principles that this Court has established to ensure that federal courts – which are courts of limited jurisdiction – entertain suits only when the plaintiffs demonstrate actual, non-speculative injury that is redressable by the relief sought. These standing principles apply to all suits, including CAA citizen suits. See *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997) (refusing to relax Article III standing principles "for the sake of convenience and efficiency"). Here, however, the Seventh Circuit abandoned this Court's standing principles and allowed a CAA citizen suit to go forward in circumstances where the plaintiff organization failed to show that one of its members would suffer a cognizable injury under the existing permit or that a new permit would redress the alleged injury – thereby facilitating suits that will

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national_energy_policy/national_energy_policy.pdf (noting that "[a] pressing long-term electricity challenge is to build enough new generation and transmission capacity to meet projected growth in demand"); *see also id.* at 1-15 ("Illinois consumers are reeling from high heating and cooling costs.").

chill the construction of much-needed and environmentally-sound power facilities.[7] The court of appeals' departure from Article III standing principles in the CAA citizen-suit context therefore presents an important question of federal law that only this Court – and not Congress – can address.

Finally, respondent misses the point in asserting (Opp. at 17-18) that this is not an instance in which private enforcement of the environmental laws has supplanted public enforcement because petitioners can file a new permit. Petitioners have been enjoined from building under the existing permit, even though the responsible public agency has never revoked the permit or ruled that it has expired. Respondent suggests (*id.* at 18 n.7) that nothing "in the record" supports petitioners' "speculation" that the IEPA has not ruled because it is "defer[ring]" to this litigation, but petitioners submit that the record speaks for itself. Nothing respondent says negates the plain fact that IEPA commenced a review of the site construction and the construction contract, pursuant to sections 113(c) and 114 of the CAA, so that IEPA could make its own final determination. For four years, faced with the Sierra Club lawsuit, IEPA has demonstrably been chilled from completing its statutorily-prescribed mission of making a final determination on the validity of the permit. The precedent that would be set by allowing citizen-suit plaintiffs, with the aid of the federal courts, to interrupt the PSD construction permit process and usurp the authority of a constitutionally-appointed

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[7] *See Statement by the President on the Budget* (Mar. 17, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Budget (noting the national priority to invest in "clean energy," including "clean coal" technology).

agency is not only dangerous and in violation of public policy and statute, but it is fundamentally unconstitutional.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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